

# GENERAL GUIDANCE FOR FEDERAL CONSISTENCY

July 2004

## A. INTRODUCTION

The Coastal Zone Management Act (CZMA) was enacted on October 27, 1972, to encourage coastal States, Great Lake States, and United States Territories and Commonwealths (collectively referred to as coastal States) to develop management programs to manage and balance competing uses of and impacts to coastal resources. The CZMA is an important law implementing the concept of federalism and emphasizes the primacy of State decision making regarding the coastal zone. Section 307 of the CZMA (16 USC 1456), called the Federal Consistency provision, is a major incentive for States to join the national coastal management program and is a powerful tool that States use to manage coastal uses and resources and to facilitate cooperation and coordination with Federal agencies.

Federal Consistency reviews are the responsibility of the lead State agency that implements or coordinates the State's federally approved Coastal Management Program (State CMP or CMP). At the federal level, the Office of Ocean and Coastal Resource Management (OCRM), within the National Oceanic and Atmospheric Administration's (NOAA's) National Ocean Service, among other duties and services, interprets the CZMA and oversees the application of Federal Consistency; provides management and legal assistance to coastal States, Federal agencies, Tribes and others; and mediates CZMA related disputes. NOAA's Office of General Counsel for Ocean Services assists OCRM and processes appeals to the Secretary of Commerce.

The Federal Consistency regulations and manual prepared by OCRM, and the CZMA are posted on NOAA's web site at [http://coastalmanagement.noaa.gov/czm/federal\\_consistency.html](http://coastalmanagement.noaa.gov/czm/federal_consistency.html). The information contained in this document is general guidance and does not supercede the Federal regulations. New Jersey's Coastal Management Office is in the process of updating its Federal Consistency list.

## B. DEFINITIONS

Federal Consistency is the CZMA requirement that *federal actions* that have reasonably foreseeable *effects* on any *land or water use* or *natural resource* of the coastal zone (also referred to as coastal uses or resources, or coastal effects) must be consistent with the *enforceable policies* of a coastal State's federally approved CMP. The following are the three categories of Federal actions:

### Federal actions:

1. *Federal agency activities* -- activities and development projects performed by a Federal agency, or a contractor for the benefit of a Federal agency.

For example, Fisheries Plans by the National Marine Fisheries Service, Naval exercises, the disposal of federal land by the General Services Administration, a U.S. Army Corps of Engineers (Corps) breakwater or beach renourishment project, an outer continental shelf (OCS) oil and gas lease sale by the Minerals Management Service (MMS), improvements to a military base, Naval disposal of radioactive or hazardous waste performed by a private contractor, activities in National Parks such as installation of mooring buoys or road construction;

2. ***Federal license or permit activities*** -- Activities not performed by a Federal agency, but requiring federal permits, licenses or other forms of federal approval. For example, activities requiring Corps 404 permits, MMS approvals for OCS oil and gas plans, Corps permits for use of ocean dump-sites, Nuclear Regulatory Commission licenses for nuclear power plants, licenses from the Federal Energy Regulatory Commission (FERC) for hydroelectric facilities;

3. ***Federal financial assistance to State and local governments.***

For example, Federal Highway Administration funds to coastal state and local governments, construction grants for wastewater treatment works, hazardous waste management trust fund, Housing and Urban Development grants.

Note: The regulations for the review of Outer Continental shelf (OCS) activities are not included in this document due to the current moratorium offshore of New Jersey.

### **Effects:**

At the heart of Federal Consistency is the “effects test.” The CZMA was amended in 1990 to,

establish a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to [the consistency requirement] if it will ***affect*** any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.

These amendments were intended to leave no doubt that all federal agency activities meeting the “effects” standard are subject to the CZMA consistency requirement; that there are no exceptions or exclusions from the requirement as a matter of law; and that the new “uniform threshold standard” requires a factual determination, based on the effects of such activities on the coastal zone, to be applied on a case-by-case basis.

**Enforceable policies:** An enforceable policy is a State policy that is legally binding under State law (e.g., through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions), and by which a State exerts control over private and public coastal uses and resources, and which are incorporated in the State’s federally approved CMP.

***In New Jersey, the enforceable policies are contained in the Coastal Zone Management rules***

*(N.J.A.C. 7:7E), the Coastal Permit Program rules, (N.J.A.C. 7:7), and the Freshwater Wetlands Protection Act rules, (N.J.A.C. 7:7A). Three major state laws are implemented through the Coastal Zone Management rules: the Waterfront Development Law, the Wetlands Act of 1970, and the Coastal Area Facility Review Act (CAFRA). The Hackensack Meadowlands Reclamation and Development Act and the Freshwater Wetlands Protection Act are additional authorities for Federal Consistency review.*

**Coastal uses:** Coastal uses include such activities as: public access, recreation, fishing, historic or cultural preservation, development, hazards management, marinas, floodplain management, scenic and aesthetic enjoyment, and resource creation or restoration projects, etc.

**Coastal resources:** Coastal resources include biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis. Biological and physical resources include, but are not limited to, air, tidal and nontidal wetlands, ocean waters, estuaries, rivers, streams, lakes, aquifers, submerged aquatic vegetation, land, plants, trees, minerals, fish, shellfish, invertebrates, amphibians, birds, mammals, and reptiles, etc.

**Coastal zone:** The Geographic scope of the New Jersey coastal zone is as follows:

1. The coastal area defined in the Coastal Area Facility Review Act (CAFRA), N.J.S.A. 13:19-1 et seq.;
2. Coastal waters, which are any tidal waters of the State and all lands lying thereunder. Coastal waters of the State of New Jersey extend from the mean high water line out to the three geographical mile limit of the New Jersey territorial sea, and elsewhere to the interstate boundaries of the States of New York, and Delaware and the Commonwealth of Pennsylvania;
3. All lands outside of the coastal area as defined by CAFRA extending from the mean high water line of a tidal water body to the first paved public road, railroad or surveyable property line existing on September 26, 1980 generally parallel to the waterway, provided that the landward boundary of the upland area shall be no less than 100 feet and no more than 500 feet from the mean high water line; (that is, upland waterfront development jurisdictional area)
4. All areas containing tidal wetlands; and
5. The Hackensack Meadowlands District as defined by N.J.S.A. 13:17-4.

## **C. NATIONAL INTEREST SAFEGUARDS**

Federal Consistency gives States substantial input into federal actions affecting the coastal zone. There are, however, safeguards which balance the need to ensure consistency for federal actions affecting the coastal zone and the importance of federal activities.

**Consistency must be based on coastal effects.** While the Federal Consistency effects test covers a wide range of federal actions, States only review federal actions that have reasonably foreseeable coastal effects. For Federal agency activities, Federal agencies make this determination of effects. For federal license or permit activities and federal financial assistance activities, OCRM makes the determination of effects by approving the *lists* of federal approvals and financial assistance programs that a State wishes to include in its CMP. In order to be on the list, the federal approval or funding program must have coastal effects in most cases. Federal agencies and other interested parties have input into OCRM's approval of such lists and additions to the lists. If a State wishes to review an *unlisted* federal license or permit activity, it must notify the applicant and the Federal agency and seek OCRM approval to review the activity. OCRM's decision is based on whether the unlisted activity will have reasonably foreseeable coastal effects and, again, OCRM seeks input from the Federal agency and the applicant.

**Consistent to the maximum extent practicable (Federal agency activities).** The CZMA at 307(c)(1) requires Federal agency activities to be fully consistent unless federal legal requirements prohibit full consistency. This ensures that Federal agencies are able to meet their legally authorized mandates, even though the activity may not be consistent with a State's enforceable policy. If a Federal agency has the discretion to meet a State's enforceable policy, then it needs to be consistent with that policy. However, federal law may limit a Federal agency's discretion and, thus, a Federal agency's administrative record may dictate an action that is not fully consistent with a State's policy. A Federal agency may also deviate from full consistency due to "exigent circumstances." An exigent circumstance is an emergency or emergency-like or unexpected situation requiring the Federal agency to take quick or immediate action.

Consistent to the maximum extent practicable and exigent circumstances refers to consistency with a State CMP's substantive requirements as well as the procedural requirements of NOAA's regulations. There may be times that a federal legal requirement or an emergency situation requires a Federal agency to act sooner than the end of the 90-day consistency period. In such cases, the Federal agency needs to consult with the State CMP as early as possible.

A Federal agency cannot use a lack of funds as a basis for being consistent to the maximum extent practicable. Thus, Federal agencies are encouraged to consult early with State CMPs to ensure that the Federal agency has budgeted for meeting State CMP enforceable policies.

A Federal agency may also proceed over a State's objection when the Federal agency determines that it is *fully* consistent with the State's enforceable policies. 15 CFR 930.43(d).

## **D. BASIC FEDERAL CONSISTENCY PROCEDURES**

### **Federal Agency Activities and Development Projects**

Federal agencies proposing an activity need to follow the Federal regulations at 15 CFR part

930, subparts A, B and C, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000). (*Note: As noted previously, the regulations for the review of OCS which differ than those listed below, are not included in this document due to the current moratorium offshore of New Jersey.*)

1. Federal development projects inside the coastal zone are automatically subject to consistency and require a Consistency Determination.
2. Federal agency determines if federal activity (in or outside coastal zone) and development projects outside the coastal zone will have reasonably foreseeable coastal effects. (*Note: By statute, all Federal **development projects** proposed in a state's coastal zone are deemed to have coastal effects and therefore the Federal agency must submit a consistency determination. A Federal **development project** is a Federal agency activity involving the planning, construction, modification or removal of public works facilities, or other structures and includes the acquisition, use or disposal of any coastal resource. For development projects outside of the coastal zone and all other Federal agency activities that are not development projects regardless of the location of the activity (that is, within or outside of the coastal zone) the Federal agency determines if the activity will have a coastal effect.*) States are encouraged to list activities that are expected to affect coastal uses or resources in their approved CMPs, and to monitor unlisted activities and to notify Federal agencies when an unlisted activity requires consistency review. However, the listing/unlisted provisions in NOAA's regulations are recommended procedures for facilitating State-Federal coordination. Whether or not an activity is listed, it is the Federal agency's responsibility to provide State CMPs with Consistency Determinations for Federal agency activities affecting the coastal zone.
3. The Federal agency should contact the State CMP at the earliest possible moment in the planning of the activity to ensure early State-Federal coordination and consultation.
4. If coastal effects are reasonably foreseeable, then Federal agency submits a Consistency Determination to State CMP at least **90 days before activity starts**. While the form of the Consistency Determination may vary, it must include a detailed description of the proposed activity, its expected coastal effects, and an evaluation of the proposed activity in light of the applicable enforceable policies in the State's CMP.
5. If no effects, Federal agency may have to provide a **Negative Determination** (A negative determination is a determination by a Federal agency that the proposed activity will not have any coastal effects). (*Note: Negative determinations are discussed in detail on page 8 of this document*)
6. State CMP has **60 days (plus appropriate extensions) to concur with or object** to the Federal agency's consistency determination. (*Note: Pursuant to 15 CFR 930.41(b), Federal agencies shall approve one request for a **15-day extension or less**. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the*

*consistency determination)*

7. The State CMP must provide for public comment on the State's consistency review. The State cannot rely on the Federal agency notice, unless the Federal agency notice specifically says that comments on the *State CMP's consistency review* should be sent to the State CMP agency. (*Note: In New Jersey, the Department publishes notice of the 15-day public comment period in the DEP Bulletin*)
8. **State concurrence presumed if State does not meet time frames.**
9. If the State CMP agrees with the Consistency Determination, then the Federal agency may immediately proceed with the activity. If the State objects, then the State's objection must describe how the proposed activity is inconsistent with enforceable CMP policies (*see page 9 of this document for further detail*). In the event of an objection, the State CMP and Federal agency should attempt to resolve any differences during the remainder of the **90 day period**. If resolution has not been reached at the end of the **90 day period** the Federal agency should consider postponing final federal action until the problems have been resolved. However, at the end of the **90 day period** the Federal agency may, notwithstanding State CMP objection, proceed with the activity only if the Federal agency clearly describes, in writing, to the State CMP the specific legal authority which limits the Federal agency's discretion to comply with the State CMP's enforceable policies. (*Note: Pursuant to 15 C.F.R. 930.4, a State CMP can issue a conditional concurrence only in cases when the Federal agency agrees to the conditions prior to issuance.*)
10. If dispute between Federal agency and State CMP, either party may seek mediation by OCRM or the Secretary of Commerce (the Secretary's mediation is more formal).

### **Federal License or Permit Activities**

A private individual or business, or a state or local government agency, or any other type of non-federal entity, applying to the federal government for a required permit or license or any other type of an approval or authorization, needs to follow the Federal regulations at 15 CFR part 930, subparts A, B and D, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

1. State CMP, with OCRM approval, determines effects. All federal license or permit activities occurring in the coastal zone are deemed to affect coastal uses or resources, if the State CMP has "listed" the particular federal license, permit, or approval in its federally approved CMP document. New Jersey's list is included as **Appendix B**.

For a *listed* activity occurring *in the coastal zone*, the applicant must submit a Consistency Certification to the approving Federal agency and the State CMP. In addition to the Certification, the applicant must provide the State with the necessary data and information to allow the State to assess the project's effects. This information will

usually be contained in the applicant's application to the Federal agency, but may include other information required by the State CMP, if the information requirement is specifically included in the State's federally approved CMP document.

For *listed* activities, *outside the coastal zone*, the applicant must submit a Consistency Certification to the State CMP and the Federal agency if the activity falls within the **geographic location** described in the State CMP document for listed activities outside the coastal zone. For listed activities outside the coastal zone where the State has *not* described the geographic location, the State CMP must follow the unlisted activity procedure described above, if it wants to review the activity. *(Note: New Jersey has not listed Federal activities outside of its coastal zone. Therefore, any Federal activity that the State wants to review under the Federal Consistency provision of the CZMA ( for example activities located in the Atlantic Ocean greater than three miles) are considered unlisted activities and shall be reviewed accordingly.)*

An applicant may also be required to submit a Consistency Certification to the State CMP for *unlisted activities*. **For unlisted activities, in or outside the coastal zone, the State CMP must notify the applicant, the relevant Federal agency, and OCRM that it intends to review the activity.** This notification shall also request OCRM's approval to review the unlisted activity and an analysis that supports the State agency's assertion that coastal effects are reasonably foreseeable. Contents of such a letter and a sample letter are available from the Coastal Management Office. **The State CMP must make this notification within 30 days of receiving notice of the activity**, otherwise the State waives its consistency rights. The waiver does not apply where the State CMP does not receive notice (notice may be actual or constructive so long as it is adequate). The applicant and the Federal agency have **15 days from receipt** of the State CMP's request to provide comments to OCRM. OCRM will make a decision usually within **30 days of receipt** of the State's request. The basis for OCRM's decision will be whether the proposed activity can be reasonably expected to affect any land or water use or natural resource of the coastal zone. The Federal agency may not approve the activity until the consistency process is complete.

2. Applicant for any required federal approval must submit a Consistency Certification and necessary data and information to the State CMP.
3. State CMP has **six months to respond**, but **must notify applicant if review will go beyond three months**.
4. The State must provide for public comment (State can require applicant to publish notice or may combine notice with Federal agency, if Federal agency agrees).
5. State concurrence presumed if State does not meet time frames.
6. If State objects, Federal agency cannot issue approval.

7. Applicant may renegotiate with State to remove State's objection or appeal the State's objection to the Secretary of Commerce within **30 days of the objection**. If the Secretary overrides the State's objection, the Federal agency may approve the project.

### **Federal Financial Assistance Activities**

A state agency or local government applying for federal financial assistance needs to follow the Federal regulations at 15 CFR part 930, subparts A, B and F, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

1. States list in their CMPs the federal financial assistance activities subject to review. The State CMP may also notify an applicant agency and Federal agency that it will review an unlisted activity. OCRM approval is not required for the review of unlisted federal financial assistance activities.
2. NOAA regulations allow State CMPs to develop flexible procedures for reviewing and concurring with federal assistance activities. State CMP review of the activities is normally conducted through procedures established by States pursuant to Executive Order 12372 -- intergovernmental review of federal programs, or through State clearinghouse procedures.
3. Federal agency may not issue the funding until State CMP has concurred.
4. State or local government applicant agency may appeal State objection to the Secretary of Commerce who may override the State's objection.

### **Negative Determinations**

A negative determination is a determination by a Federal agency that a proposed activity will not have any coastal effects (see 930.35).

1. Negative determinations shall include a brief description of the activity, the activity's location and basis for the Federal agency's determination that the activity will not affect any coastal resource.
2. A negative determination shall be provided to the State agency at least **90 days before final approval** of the activity unless the State and Federal agencies have agreed to an alternate notification schedule.
3. The State agency is not obligated to respond to a negative determination.
4. If a State agency does not respond to the Federal agency's negative determination within **60 days**, State agency concurrence is presumed.



5. State agency concurrence is not presumed in cases where the State agency, within the **60 day** period requests an extension of time to review the determination. Federal agencies shall approve one request for an extension period of 15 days or less.
6. If a State agency objects to the negative determination asserting that coastal effects are reasonably foreseeable, the Federal agency shall consider submitting a consistency determination or otherwise attempt to resolve any disagreement within the remainder of the **90 day** period as set forth in 2 above.
7. In the event of serious disagreement between the Federal and State agencies regarding a determination related to whether a proposed activity affects any coastal use or resource, either party may seek Secretarial mediation or OCRM mediation services.

### **Mediation of Disputes**

In the event of a serious disagreement between a State CMP and a Federal agency, either party may request that the Secretary of Commerce mediate the dispute. Secretarial mediation is a formal process that includes a public hearing, submission of written briefs, and meetings between the parties. A hearing officer, appointed by the Secretary, will propose a solution. Secretarial mediation is only for States and Federal agencies. For mediation to proceed, all parties must agree to participate, agreement to participate is non-binding, and either party may withdraw from the mediation at any time. Exhaustion of the mediation process is not a prerequisite to judicial review.

The availability of Secretarial mediation or litigation does not preclude the parties from informally mediating the dispute through OCRM or another facilitator. OCRM has successfully mediated disputes and offers its good offices to resolve conflicts. Most disputes are addressed through this informal method. Either party may request OCRM involvement, and participation is non-binding.

### **Appeals to the Secretary of Commerce**

The CZMA provides an administrative appeal to the Secretary of Commerce from a consistency objection by a coastal State. In the case of a federal license or permit, or an application for federal financial assistance, the applicant may request that the Secretary override the State's consistency objection if the activity is consistent with the objectives of the CZMA (Ground I), or is otherwise necessary in the interest of national security (Ground II). 16 USC § 1456(c)(3)(A),(B), and (d). Secretary appeals are not available for Federal agency activities. The requirements for appeals are found at 15 CFR part 930, subpart H, as revised by 65 Fed. Reg. 77123-77175 (December 8, 2000).

If the requirements of either Ground I or Ground II are met, the Secretary overrides the State's objection. The Secretary's inquiry into whether the grounds for an override have been met is

based upon an administrative record developed for the appeal. While the Secretary will review the State objection for CZMA compliance, e.g., whether the objection is based on enforceable policies, the Secretary does not review the objection for compliance with State laws and policies.

If the Secretary overrides the State's objection the authorizing Federal agency may permit or fund the activity. A secretarial override does not obviate the need for an applicant to obtain any State permits or authorizations. Factors influencing the appeal process time include: nature and complexity of the dispute, stays requested by one of the parties, public hearings, and briefing schedules.

The Secretary appeal process is final Federal agency action under the Administrative Procedure Act and is a necessary administrative action prior to litigation.

### **Information that Should Be in State Objection Letters**

State objection letters under the CZMA Federal Consistency regulations should include the following information:

1. The objection (or conditional concurrence) must be based on enforceable policies that are part of the State's federally approved CMP.
2. The objection letter must describe *how* the activity is inconsistent with specific enforceable policies.
3. The objection must be timely. An objection letter should include the date the complete Consistency Certification or Consistency Determination and necessary information was received by the State. The State's objection letter should also include the date that the State provided a three-month notice to the applicant for a federal license or permit activity describing the status of the State's review.
4. For federal license or permit activities, or financial assistance activities, the objection letter must advise the applicant, person or applicant agency, of the right to appeal the State's objection to the U.S. Secretary of Commerce within **30 days of receipt of the letter**.
5. If the objection is based on insufficient information, the objection letter must describe the nature of the information requested and the necessity of having that information to determine consistency.
6. An objection letter should include alternatives that would be consistent with the State's CMP enforceable policies. Consistent alternatives should be described with as much specificity as possible to allow the applicant, or the Secretary of Commerce, to determine if the alternatives are available and reasonable.

7. The objection letter must be sent to the applicant, the appropriate Federal agency, and the Director of OCRM.

*Appendix A* contains a chart summarizing the consistency requirements.

## Appendix A: Summary of Federal Consistency Provisions

	Federal Agency Activities & Development Projects	Federal License or Permit Activities	OCS Plans: Exploration Development & Production	Federal Assistance to State and Local Govts.
<b>CZMA Section 307</b>	(c)(1)&(2)	(c)(3)(A)	(c)(3)(B)	(d)
Activity subject to review, if it ...	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone	Affects any land or water use or natural resource of the coastal zone
Consistency requirement	Consistent to maximum extent practicable with state CMP enforceable policies	Consistent with state CMP enforceable policies	Consistent with state CMP enforceable policies	Consistent with state CMP enforceable policies
Who decides effects?	Federal agency	State CMP and OCRM	State CMP and OCRM	State CMP and OCRM
Time limit	60 days, plus 15 day extension	6 months	3 months - state may extend to 6 months	Clearinghouse schedule
Impact of State Objection	Federal agency may proceed only if cite legal authority as to why it must proceed despite inconsistency	Federal agency may not issue permit, license, or other approval	Federal agency may not approve plan or issue permits	Federal agency may not grant assistance
Administrative conflict resolution	Mediation by the Secretary of Commerce or OCRM (voluntary, non-binding)	Appeal to the Secretary to override State objection	Appeal to the Secretary to override State objection	Appeal to the Secretary to override State objection